STATE OF MICHIGAN

COURT OF APPEALS

JAMES PARRISH,

Plaintiff-Appellant/Cross-Appellee,

and

KATHLEEN BAUGHMAN,

Plaintiff,

v

STEVEN SHERRILL,

Defendant-Appellee/Cross-Appellant,

and

LEONARD SHERRILL,

Defendant.

UNPUBLISHED
January 18, 2007

No. 263256
Livingston Circuit Court
LC No. 03-019974-NI

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff James Parrish[1] appeals as of right from a judgment, entered after a jury trial, declaring defendant Steven Sherrill[2] only one percent at fault for an underlying car/motorcycle

---

[1] Plaintiff Kathleen Baughman settled with defendants and was dismissed from the case by stipulation of the parties. Therefore, the term "plaintiff" is used to refer to plaintiff Parrish only.

[2] Defendant Leonard Sherrill was dismissed from the case by stipulation of the parties and is not a party to this appeal. Therefore, the term "defendant" is used to refer to defendant Steven Sherrill only.

accident, and awarding plaintiff $3,000 in damages. Defendant cross appeals the trial court's decision to allow plaintiff to tax costs. We affirm.

Plaintiff first argues that the evidence at trial was insufficient to support the jury's verdict. Although plaintiff frames this issue as a challenge to the sufficiency of the evidence, we agree with defendant that plaintiff is substantively arguing that the jury's verdict, specifically its allocation of fault, is against the great weight of the evidence. Indeed, the remedy sought by plaintiff is a new trial, which is the appropriate remedy when a jury's verdict is against the great weight of the evidence. Conversely, entry of judgment in favor of the moving party is the appropriate remedy when the evidence is legally insufficient to support a verdict in favor of the opposing party.

A new trial may be granted where the verdict is against the great weight of the evidence, but only where the evidence preponderates so heavily against the verdict that it would be a serious miscarriage of justice to allow the verdict to stand. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 518; 679 NW2d 106 (2004). Where the question is one of credibility, the verdict may not be overturned unless the directly contradictory testimony has been so far impeached that it was "deprived of all probative value or that the jury could not believe it." *Shuler*, *supra* at 519 (citations omitted).

The evidence at trial indicated that plaintiff was traveling on a motorcycle behind defendant's vehicle on a freeway entrance ramp, that defendant was unable to successfully merge onto the freeway because an SUV occupied the freeway lane, that defendant slowed his vehicle to allow the SUV to pass so that defendant could merge onto the freeway, and that plaintiff's motorcycle subsequently came upon defendant's vehicle and the SUV, attempted to go between the two vehicles, and collided with defendant's vehicle.

Giving the benefit of all reasonable inferences to defendant, defendant's expert calculated that at the time of the collision, defendant was driving approximately 10 to 18 mph at the end of the freeway merge ramp because, according to defendant's testimony, the SUV would not allow him to merge onto the freeway. The evidence suggests two possible scenarios in which defendant would have been unable to successfully merge behind the SUV: (1) defendant intended to merge in front of the SUV as he accelerated through the merge ramp, was unsuccessful because the SUV would not allow him to safely merge, so he slowed down at the last minute, or (2) defendant stopped accelerating or slowed down through the ramp intending to merge behind the SUV, but the SUV slowed as defendant slowed. The first scenario is consistent with defendant's testimony that he and the SUV were traveling at the same speed down the ramp, and that he slowed down when he ran out of ramp, and drove partially onto the shoulder. The second scenario is supported by evidence that defendant and the SUV were traveling at the same speed all the way down the ramp, that defendant slowed down in order to merge behind the SUV, yet he and the SUV were still side by side at the end of the ramp, that there were no skid marks before impact (which might indicate sudden deceleration or sudden braking by defendant), and that plaintiff was attempting to squeeze between defendant and the SUV at the time of impact. It is also supported by witness testimony that the SUV was not allowing defendant to merge, and by defendant's testimony that he last saw the SUV immediately before the collision. These factual scenarios give rise to conflicting inferences concerning the degree of defendant's negligence, if any, which were for the jury to resolve.

Additionally, defendant testified that he last saw the motorcycle when he looked over his right shoulder "to start to merge," and that he felt the impact "as soon as I started to come over." An inference arises that, having driven partially onto the shoulder at 10 to 18 mph, defendant negligently merged into plaintiff, who was trying to avoid the collision by going around defendant on the right. However, there was also evidence that plaintiff did not see the SUV as he proceeded down the ramp, did not take reasonable precautions to anticipate the conflict between defendant and the SUV, did not maintain an assured clear distance, and was attempting to squeeze between defendant and the SUV to avoid a collision. There is also evidence that, as plaintiff steered to the right, the rear of his motorcycle pitched slightly to the left, striking defendant's car. Thus, conflicting inferences arise that plaintiff was negligent by being inattentive and not maintaining an assured clear distance, and that the principal cause of the collision was not negligence by defendant, but plaintiff's negligent conduct, which created the situation whereby plaintiff was required to attempt a sudden evasive maneuver to avoid an accident. Again, plausible conflicting inferences arise from these scenarios, supported by the evidence, presenting factual questions for the jury to resolve. Thus, we conclude that the jury's allocation of fault was not contrary to the great weight of the evidence.

Next, plaintiff argues that there were several instructional errors that deprived him of a fair trial. We disagree.

Plaintiff explicitly agreed to waive an instruction concerning his theory of the case. Therefore, that issue has been affirmatively waived. An "apparent error that has been waived is 'extinguished,'" and is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Plaintiff did not object to the trial court's remaining jury instructions and, accordingly, his instructional claims are not preserved. Thus, plaintiff must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Claims of instructional error are generally reviewed de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). Jury instructions are reviewed as a whole rather than piecemeal. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); see also *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993). Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence. *Ward*, *supra* at 83-84; *Case*, *supra* at 6. Instructions must also be supported by the evidence. *Bordeaux*, *supra* at 169. Even if somewhat imperfect, reversal is not required if, on balance, the instructions given fairly and adequately appraised the jury of the applicable law and the parties' theories. *Id.*

Whether plaintiff failed to maintain an assured clear distance, contrary to MCL 257.627(1) and MCL 257.402(a), was a disputed issue at trial. The instruction given by the trial court was supported by the evidence, and fairly and adequately appraised the jury of the applicable law and the parties' factual and legal theories.

The sudden emergency instruction given by the trial court, M Civ JI 12.02, is the current version of the instruction that plaintiff now argues should have been given (former SJI 12.01[A]). With regard to whether the court should have inserted excuse (d) (sudden emergency) rather than instructing the jury on excuse (c) (unable to comply after due diligence), we note that the facts giving rise to a sudden emergency must be both unusual and unsuspected.

See *Spillers v Simons*, 42 Mich App 101, 104-105; 201 NW2d 374 (1972). In this case, it is a close question whether the facts would support a finding that defendant's behavior was unusual and unsuspected as those terms have been defined by case law. *Spillers, supra*. Nonetheless, any error did not affect plaintiff's substantial rights because, viewed as a whole, the instructions given fairly and adequately appraised the jury of the applicable law and the parties' theories.

The trial court properly gave a minimum speed instruction based on MCL 257.628(7).[3] Plaintiff's argument that defendant was not "traveling" is unsupported by the record. Even if the instruction contained unnecessary language concerning whether plaintiff reduced his speed in compliance with the law or a special permit, the instruction given was proper because it allowed the jury to infer that defendant was negligent if he violated the minimum speed statute, or that he was not negligent if they found that his violation was excused by the circumstances. There was no plain error.[4]

On cross appeal, defendant argues that the trial court erred in allowing plaintiff to tax costs as the prevailing party. We disagree.

Generally, an award of taxable costs is reviewed for an abuse of discretion, but whether legal authority exists to support the award is a question of law to be reviewed de novo. *LaVene v Winnebago Industries*, 266 Mich App 470, 473; 702 NW2d 652 (2005). The determination whether a party is a "prevailing party" for purposes of taxation of costs is a question of law to be reviewed de novo. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 489; 717 NW2d 341 (2006).

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise." MCR 2.625(B)(2) provides that "[i]f there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party." See also MCL 600.2421b(3). As recognized by the parties:

> "The fact that [a party] recovered less than the full amount of damages sought is not dispositive of whether it was the prevailing party. On the other hand, mere recovery of some damages is not enough; in order to be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation." [*Angott, supra* at 489, quoting *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998).]

---

[3] The statute was amended in 2003, and this provision was recodified as subsection (9).

[4] Plaintiff's conclusory statement that the trial court should have instructed the jury concerning passing on the right is insufficient to properly present this issue, and we decline to address it. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). The same is true with plaintiff's one-sentence arguments concerning the careful and prudent speed instruction, and the duty to look before merging.

In *Ullery v Sobie*, 196 Mich App 76, 78; 492 NW2d 739 (1992), the jury returned a $45,000 verdict for the plaintiff, finding that the defendant was 40 percent negligent and the plaintiff 60 percent negligent—with 17 percent negligence attributable to the plaintiff's failure to wear a seatbelt. At the time, MCL 257.710e(5) provided that an accident victim's failure to wear a seatbelt could not reduce his or her damages award by more than five percent. *Id*. Thus, the trial court reduced the jury award pro rata, reallocated the plaintiff's excess fault to the defendant, and entered a $20,340 judgment for the plaintiff, plus statutory costs and attorney fees. *Id*. at 78-79.

On appeal, this Court rejected the defendant's argument that the trial court erred in denying his motion to tax costs because the jury had found that the "plaintiff was more negligent than he." *Id*. at 82. The defendant also argued that the trial court erred in allowing the plaintiff to tax costs. *Id*. at 83. Unlike in the present case, however, the trial court in *Ullery* did not award costs and attorney fees under MCR 2.625, but under MCR 2.405. *Id*. See, also, *McMillan v Auto Club Ins Ass'n*, 195 Mich App 463, 466; 491 NW2d 593 (1992), where we held that the plaintiff was a prevailing party entitled to tax costs even though he did not obtain all the damages he sought.

Conversely, "where a party does not succeed on its claim, it is not a prevailing party even if its position is improved as a result of the litigation." *McMillan*, *supra* at 466. For example, in *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602, 604; 423 NW2d 284 (1988), the plaintiff brought suit for breach of contract for the sale of a condominium. The trial court found that the parties did not have a purchase agreement, but only an option contract. *Id*. at 604-607. The court found that the plaintiff was entitled to keep the defendant's $2,600 deposit, over the defendant's objection, as consideration for the option contract. *Id*. On appeal, this Court found that because the plaintiff failed to prove its claim that a purchase agreement existed, and the defendant failed to prove his claim for recovery of the deposit, neither party had prevailed in full. *Id*. at 608-609. Therefore, although the plaintiff improved its position at trial (by recovering $2,600), the trial court erred in allowing the plaintiff to tax costs. *Id*.

Similarly, in *Three Lakes Ass'n v Kessler*, 101 Mich App 170, 172; 300 NW2d 485 (1980), an association of riparian land owners sought to enjoin the defendants from accessing a lake through an easement. The trial court held that beneficial use of the easement could be vested in the subdivision lot owners, and that the plaintiffs had failed to prove that the defendant's use was unreasonable. *Id*. at 172-173. On appeal, this Court declined to follow federal cases awarding costs "to a party who was successful on only part of his claim." *Id*. at 177. Rather, because the plaintiffs did not receive the relief they sought (an injunction), they did not substantially prevail, and were not entitled to costs. *Id*. at 177.

In *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 237-238; 635 NW2d 379 (2001), a house fire was apparently caused by a light fixture manufactured by the defendant, but the home was repaired shortly thereafter, removing all remaining physical evidence. On the defendant's motion, the trial court dismissed the plaintiff's claim based on the failure to preserve evidence, and this Court affirmed. *Id*. at 239-245. On appeal, the plaintiff argued that the trial court erred in awarding costs to the defendant under MCR 2.625. *Id*. at 240, 245. This Court disagreed, finding that, by obtaining a dismissal, the defendant had prevailed on the entire record and was entitled to tax costs. *Id*. at 245-246.

In light of these cases, we conclude that in order to be considered a prevailing party entitled to tax costs under MCR 2.625, a party must succeed on the claim (or defense) asserted, not on some other basis, *and* it must recover some part of the relief requested (be it money damages or injunctive relief). In *Angott*, for example, in determining that the plaintiff was the prevailing party entitled to tax costs, this Court compared the plaintiff's "extremely substantial" award (as adjusted on appeal) to its pre-litigation position, noting that the "defendant had paid [the] plaintiff *nothing* at the time the complaint was filed." *Angott*, *supra* at 489 (emphasis in the original).

In the present case, plaintiff claimed that defendant breached his duty of care, and that defendant's breach was a proximate cause of the accident. Plaintiff prevailed on that claim and recovered some damages, albeit not all the damages he sought. Thus, the trial court did not err in finding that plaintiff was the prevailing party under MCR 2.625, and was entitled to tax costs. The fact that plaintiff was found to be more negligent than defendant did not preclude an award of costs under MCR 2.625.

Defendant also argues, however, that because plaintiff recovered less than defendant's settlement offer, he did not prevail on the whole record and was not entitled to tax costs. We disagree. The difficulty we have with defendant's position is that it is premised on a settlement offer, rather than an offer of judgment. As this Court explained in *Haberkorn v Chrysler Corp*, 210 Mich App 354, 378; 533 NW2d 373 (1995):

> *An offer of judgment is not the same as an offer to settle*. An agreement to settle does not necessarily result in a judgment. Although it usually results in a stipulated order of dismissal with prejudice, such an order does not constitute an adjudication on the merits. It merely "signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding." 9A Michigan Law & Practice, Dismissal & Nonsuit, § 2, p 137. The plain language of MCR 2.405(A)(1) clearly requires an offer of judgment, not just an offer to settle. [Emphasis added.]

The *Haberkorn* Court concluded that, because the defendant's settlement offer did not constitute an offer of judgment, it did not cut off the plaintiffs' entitlement to case evaluation sanctions. *Id.* at 378-379.

In the present case, defendant made a settlement offer to plaintiff, but did not make an offer of judgment under MCR 2.405. Therefore, the offer does not preclude an award of costs under MCR 2.625. The trial court did not err in finding that, as the prevailing party, plaintiff was entitled to tax costs under MCR 2.625.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens